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Supreme Court, U.S.
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OFFICE OF THE CLERK

In the Supreme Court of the United States

DWAIN LEE KIRKLAND,

Petitioner,

v.

RUBY KIRKLAND, Executor &
RUBY P. KIRKLAND et. al,

Respondent.

On Petition for Writ of Certiorari
To the Superior Court of Madison County Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does it violate the Due Process clause of the 14th Amendment for a trial court to hear, grant and issue a leviable *fieri fascias*, pursuant to an OCGA 9-15-14 motion for attorney's fees and costs--based on the supposition that a Plaintiff's legal positions are completely lacking in substance as to both law and fact--while the original body of the case has not yet been heard or denied certiorari by The Supreme Court of The United States.

2. Does any part of the way in which the state of Georgia handles the assessment of attorney's fees and costs, and the subsequent discretionary only appeal, pursuant to OCGA 9-15-14, violate The Constitution of the United States, or any of its amendments, more specifically the 5th, 7th and 14th amendments.

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Constitutional and Statutory Provisions:

U.S. Const. art. VI, cl. 2
U.S. Const. Amendment V
U.S. Const. Amendment VII
U.S. Const. Amendment XIV
O.C.G.A. 9-5-14

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Other Authorities:

None

OPINIONS BELOW

A Findings of Fact and Conclusions of Law pursuant to OCGA 9-15-14 was prepared by Defendants' counsel, signed by the judge, and entered in The Superior Court of Madison County Georgia on December 10th, 2007 (App. Infra, 4a).

An 8 page written opinion on the main body of Case #A07A0863 was entered by The Court of Appeals of Georgia on April 17th, 2007 (App. Infra, 12a).

A one-page, two-line order denying Plaintiff's motion for summary judgment, and granting defendant's motion for summary judgment, was entered by The Superior Court Madison County Georgia on October 23rd, 2006 (App. Infra, 19a).

Writs of certiorari, on both the main body of the case and this appeal, were denied by The Supreme Court of Georgia, last being Case #S08C0966 denied May 19th, 2008 (App., infra, 1a).

A writ of certiorari on the main body of the case #07-1115 was denied by This Court on April 14th, 2008 (App., infra, 2a).

JURISDICTION

The state court of last resort was the Supreme Court of Georgia. Order denying a writ of certiorari Case #S08C0966 was entered May 19th, 2008. This Court's jurisdiction is invoked under 28 USCS § 1257. State courts; certiorari. Relevant part: "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where...any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of...the United States.

(June 25, 1948. ch 646, § 1, 62 Stat. 929; July 29, 1970, P.

L. 91-358, Title I, Part D, Subpart 2, § 172(a)(1), 84 Stat. 590; June 27, 1988, P. L. 100-352, § 3, 102 Stat. 662.)"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the U.S. Constitution, the Supremacy clause, relevant part: "[T]he Laws of the United States...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment V, U.S. Constitution, relevant part: "[N]or be deprived of life, liberty, or property, without due process of law..."

Amendment VII, U.S. Constitution, relevant part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment XIV, U.S. Constitution, relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OCGA 9-15-14:
(This code section is reproduced in its entirety in Question #2)

STATEMENT

A. COURT RULINGS BELOW

The Supreme Court of Georgia denied Plaintiff a writ of certiorari on Case #S08C0966 May 19th, 2008 (App. infra, 1a).

This Court denied Plaintiff a writ of certiorari on the original body of the case #07-1115 April 14th, 2008 (App. infra, 2a).

The Court of Appeals of Georgia denied Plaintiff's application for a discretionary appeal of an award of fees and costs pursuant to OCGA 9-15-14, Case #A08D0184 entered January 31st, 2008 (App. infra, 3a).

The Superior Court of Madison County Georgia awarded Defendants $9,040.42 in attorney's fees and costs pursuant to OCGA 9-15-14 December 10th, 2007 (App. Infra, 4a). (This was due to The Court of Appeals of Georgia returning the remittitur to the trial court on the main body of the case, pursuant to their rule 39(b), before This Court had ruled on Certiorari.)

The Supreme Court of Georgia denied Plaintiff a writ of certiorari on the original body of the case, #S07C1385, on September 10th, 2007.

The Court of Appeals of Georgia delivered an 8 page opinion #A07A0863 on April 17th 2007 disallowing Plaintiff's objection to an affidavit served by mail one day prior to the summary judgment hearing; holding the tort discovery rule and Official Code of Georgia Annotated 50-21-27 (the tort discovery rule codified) did not toll the statute of limitations on Plaintiff's psychiatric injuries resulting from child abuse. Tolling the statute for Plaintiff's psychiatric injuries was denied despite Georgia's 20 plus year precedent of tolling the statute when unknown physical injuries occur. (App. infra, 12a)

The Superior Court of Madison County Georgia issued a one line ruling granting Defendant's motion for

summary judgment; denying Plaintiff's motion for summary judgment, Case #04-MV-584-H entered October 23rd, 2006. Trial court judge Hodges did not break the seals on Plaintiff's deposition despite signing a defendant proffered order stating he reviewed all admissible items of record. The Georgia appellate court's have consistently held that not examining the evidence presented on summary judgment by not opening a deposition is not a violation they will remedy on appeal.

B. FACTS OF THE CASE

This is a writ of certiorari to The Superior Court of Madison County Georgia. In the trial court below, Plaintiff made numerous constitutional objections to the way in which an award of attorney's fees and costs is handled pursuant to OCGA 9-15-14. Plaintiff also requested a jury trial pursuant to the 7th Amendment and This Court's holding in Gideon v. Wainwright on the facts of the case, as alleged in Defendants' motion, as he believes OCGA 9-15-14 as it has been interpreted by the state supreme court is not in fact a sanction, but is actually a tort damage.

All Plaintiff's objections were overruled and the motion for a jury trial was denied. The trial court, as finder of fact, awarded Defendants $9,040.42 in attorney's fees and costs.

Pursuant to OCGA 5-6-35(a)(10), Plaintiff made application for a discretionary appeal to The Court of Appeals of Georgia. The Application was denied.

Plaintiff then filed a petition for a writ of certiorari to The Supreme of Georgia. The petition was denied May 19th, 2008.

The award of fees and costs, with constitutional objections, is now before this Court on a petition for writ of certiorari.

C. QUESTION #1

Does it violate the Due Process clause of the 14th Amendment for a trial court to hear, grant and issue a leviable *fieri fascias*, pursuant to an OCGA 9-15-14 motion for attorney's fees and costs--based on the supposition that a Plaintiff's legal positions are completely lacking in substance as to both law and fact--while the original body of the case has not yet been heard or denied certiorari by The Supreme Court of The United States.

Was the trial court's hearing of Defendants' motion for attorney's fees and costs, pursuant to OCGA 9-15-14, before the original body of the case was *res judicata [a thing decided]* by the Supreme Court of The United States erroneous?

As a practice outlined in its rules, The Court of Appeals of Georgia returns the remittitur to the trial court upon a final disposition of the case in the state supreme court. The Court of Appeals of Georgia does not wait for the issue of certiorari to be settled at The Supreme Court of the United States. This practice allows a litigant to file a motion and collect damages pursuant to OCGA 9-15-14 before The Supreme Court of the United States has had the last say on the original body of the case, before the original body of the case is *res judicata*.

Regarding the issue of *res judicata* and a petition for certiorari to the U.S. Supreme Court:

> It is the general rule that a judgment sought to be used as a basis for the application of the doctrine of res judicata must be a final judgment. 46 AmJur2d 626, Judgments, 457; Annot. 9 ALR2d 984. In Georgia a judgment is suspended when an appeal is entered within the time allowed. Code 110-303. And the judgment is not final as long as there is a

right to appellate review. Chlupacek v. Chlupacek, 226 Ga. 520 (3) (175 SE2d 834). As the first trial in the instant case is not final it cannot act as res judicata because res judicata is a bar to subsequent action between the same parties seeking similar relief. Salter v. Heys, 207 Ga. 591, 593 (63 SE2d 376); Walker v. Hamilton, 210 Ga. 155 (2) (78 SE2d 511).

LEXINGTON DEVELOPERS, INC. v. O'NEAL CONSTRUCTION COMPANY, INC., 54272 (143 Ga. App. 440) (238 SE2d 770) (1977).

"[T]he judgment was not final"; Plaintiff's "right to appellate review" was still available when the trial court held a hearing on November 17th. 2007 pursuant to Defendants' motion for attorney's fees and costs. Plaintiff did ultimately exercise his "right to appellate review" before The Supreme Court of The United States in a petition for certiorari, Case #07-1115.

Is this practice by The Court of Appeals of Georgia violative of the Due Process clause of the 14th Amendment? If not, why don't they simply return the remittitur to the trial court before the state supreme court has an opportunity to rule on the main body of the case as well?

The practice was objected to at pages 9 to 13 of November 17th, 2007 hearing transcript. An excerpt of those pages and the objection are included in Question #2 below. Plaintiff maintained the objection he had raised in the trial court in error #1 in his application for discretionary appeal to The Court of Appeals of Georgia:

1. The trial court's hearing of Defendants' motion for attorney's fees and costs before the case was res judicata [a thing decided] by the Supreme Court of The United States was erroneous.

Plaintiff timely served Georgia's Attorney General with a copy of the filing in The Court of Appeals of Georgia.

Plaintiff maintained his objection in the same Error #1 in his petition for certiorari to The Supreme Court of Georgia. Again, Georgia's Attorney General was timely served with a copy of the filing in The Supreme Court of Georgia.

D. QUESTION #2

Does any part of the way in which the state of Georgia handles the assessment of attorney's fees and costs, and the subsequent discretionary only appeal, pursuant to OCGA 9-15-14, violate The Constitution of the United States, or any of its amendments, more specifically the 5th, 7th and 14th amendments.

"Usually when he came by the Lester place with turnips or sweet potatoes, or for that matter with any kind of food, he left the road half a mile from the house and made a wide circle through the fields, returning to the road a safe distance beyond." *Page 1, paragraph 4, Erskine Caldwell's* Tobacco Road *(1932).*

Does this statement adequately describe the judicial system in the state of Georgia? Thieving? Corrupt? So corrupt in fact that one must leave the road a half mile from their house and only return to it "a safe distance beyond." A great many lawyers in Georgia would argue that it does. And the politicians claim there is nothing they can do about it.

Has it become this way due to the English custom of Summary Judgment and other ploys to end-run the seventh amendment and Trial by Jury? Perhaps.

The first time I encountered rumors of "the Lesters" was in the office of a trial lawyer who had practiced litigation in Georgia for 40 years, since the late 1960's. He told of a Probate case, a will, where he had won caveat in a

jury trial only to have it overturned by the Georgia Supreme Court for insufficiency of evidence. And yet he claimed the record was replete with evidence. I wrote it off, thinking that surely he must have been wrong, that surely he must have misunderstood the law. Yet I did bear in mind that the will in question was worth $11,000,000, left the wife nothing, the 18 year-old girlfriend the entire pot of gold at the end of the rainbow.

Were things beginning to sound a bit *Tobacco Roadish* in Georgia?

I relatively soon thereafter experienced summary judgment on my own will case, even though the record was replete with evidence.

It seems that misrepresenting the record is at least one way for an appellate court to swindle a case. I have experienced at least two others: simply claiming that the plain language of the law or the plain language of a case does not say what it says; and, comparing rotten apples to Florida Oranges, citing a losing case that is, on a factual basis, totally distinguishable from the case at bar. The Court may see all three in this case before it.

Now, before the court would simply write me off as some *pro se* litigant who doesn't know the law, I argued 9 cases--traffic, magistrate (small claims), superior--over the course of 25 years in Miami and won them all, 100%. In 5 years in Georgia, I have lost 6 cases, 18 court appearances trial and appellate, upwards of 90 arguments, lost them all, 100%.

Did I suddenly become deaf, dumb and blind upon crossing the border into Georgia. Not likely. Are the courts in Georgia simply incompetent? Not likely. They never made a single "mistake," of the 90 arguments, in my favor.

Now some lawyers, the ones more in the know, will tell you, off the record of course, that there is a conspiracy amongst the law clerks at the Georgia appellate courts to see that their frat buddies never lose a case. Given the

evidence, it's quite plausible, almost impossible for the law clerks not to be involved in such a conspiracy, if one exists. But how could such a broad, comprehensive and blatant conspiracy be run without the knowledge of the judges and justices. It would seem nigh onto impossible, not plausible at all. (You can also see the same tinkering in high-profile, media-attention cases.)

Could the courts in Georgia simply be a venue for political beauty contests? This seems far more likely. I have had a very decent chap, a bankruptcy lawyer, tell me that he had ceased litigation in the Georgia courts and turned to bankruptcy law because he could never count on the law and the facts to see him through; the whole thing was strictly "political."

I heard through the grapevine that another lawyer simply remarked, "The tort laws have gone soft." Hearsay? Absolutely. But sometimes even hearsay is true.

Now I would not waste the Court's time and the above 9 paragraphs making an argument if I felt there was nothing to be gained from it. I hope to gain justice for myself and the other citizens of the state of Georgia. It is only through telling the truth about a problem that a person can find a true solution. The problem here in Georgia is corruption.

Now there is and has been, in the federal system, since 1791, a solution for corruption--even incompetence, even sheer bias, prejudice and bigotry (the political beauty contest)--it is Trial by Jury as set forth in the 7th Amendment. Due to the aforesaid statewide corruption, is it not time to apply the 7th Amendment to the states via the 14th Amendment. In *Gideon v. Wainwright, 372 U.S. 335 (1963)*, the 6th Amendment was applied to the states via the 14th. I really don't know how such a thing could hurt. It would simply give This Court a little more power to see that "the Lesters" of this world don't steal that 50 cent sack of turnips.

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Turning to the main body of the case at hand, it was before this Court on a petition for certiorari, case #07-1115 and was denied April 14th, 2008 (App. Infra 2a). Is the main body of the case still in this term of the court? Could it still be granted certiorari along with this portion of the case?

Regarding the aforementioned corruption and the main body of the case, the decision of the Court of Appeals of Georgia (App. Infra 12a-18a) is erroneous, and appears intentionally so, in more than a few places. It is necessary to get into the erroneous nature of the original case because Defendants can only prevail in an award of attorney's fees and costs when the underlying case is "frivolous."

Of first interest to this Court would be the fact that Defendants' counsel were unaware of the Discovery Rule and the tolling of the statute of limitations under Georgia common law and code (when the Plaintiff has exercised reasonable care and yet has not discovered his injury nor the casual relationship of defendants' actions to his injury). Defendants filed a motion for summary judgment, Plaintiff answered and filed a cross-motion; Defendants did not respond with evidence of any kind until 5:00 P.M. of the day before the hearing and "served" the Plaintiff with that affidavit via the U.S. Mail. Obviously Plaintiff could not to respond to such an affidavit for 3 days because that is what state law allows for him to receive it in the mail. Plaintiff argued that such service was not Due Process, that the affidavit should have been served by hand delivery, that he obviously had no time in which to respond before the next day's hearing. Had Plaintiff prevailed in this argument, Defendants' counsel would have lost $5,000,000 for Defendants in one fell swoop. Is this perhaps where the political beauty contest came in? Could Defendants' counsel

have been sued for $5,000,000 for legal malpractice?

Regarding section (1) of the opinion (App. Infra 12a-18a) and the re-cusals of Judges Hodges and Bailey, Plaintiff's actions were not knee-jerk. Judge Hodges words alone did not show contempt and disdain for the Plaintiff; it was his tone and demeanor, something that does not show in a cold transcript. Plaintiff filed a 16 count affidavit alleging a number of incidents and a specific pattern of conduct directed at Plaintiff over a long period of time by Judge Hodges. None of the other 15 allegations other than Judge Hodges' statement made it into the opinion.

Getting back to one of the techniques used by an appellate court to swindle a case--misrepresentation of the record--none of the other information concerning the judge's behavior made its way into the opinion of the Court of Appeals of Georgia (C.O.A.G). Judge Hodges did ultimately return summary judgment against the Plaintiff on all three cases before him without breaking the seals on any of Plaintiff's depositions on any of the cases; and, without so much as one line of script concerning Findings of Fact or Conclusions of Law. Judge Hodges actually disposed of the original case with a bench ruling and asked Defendants' counsel to prepare the two line order (App. Infra 19a-20a).

Does the practice of having counsel prepare a two line order for a case alleging Negligence, Intentional Infliction of Emotional Distress and Breech of Contract meet the burden of Due Process of law? Is a Findings of Fact and Conclusions of Law not in order? Could this Court make a ruling on such a practice?

The untimely service of defendants' affidavit, discussed above, is taken up in section 2 (App. Infra 15a) of the C.O.A.G. (for the sake of brevity) ruling.

In section 3 (App. Infra 16a) of the opinion, C.O.A.G states "the alleged abuses were themselves wrongful." This one falls under "simply claiming that the plain language of

the law or the plain language of a case does not say what it says." This statement would be correct if the person sustaining the abuses was an adult. Plaintiff was however a minor child and had no standing under Georgia law to bring an action for civil battery. This was pointed out in a motion for reconsideration. Of course nothing about the opinion was changed.

In section 4 of the opinion (App. Infra 17a), C.O.A.G applies *Hickey* and *Bitterman* to the tolling of the statute of limitations for Plaintiff's Post Traumatic Stress Disorder, a psychological or mental injury. This comes under the heading of "comparing rotten apples to Florida Oranges, citing a losing case that is, on a factual basis, totally distinguishable from the case at bar." In both *Hickey* and *Bitterman*, the injuries were of a physical nature, caused by an impact, and neither adult Plaintiff exercised reasonable care by getting a medical evaluation in the 2 years following the injury. Plaintiff pointed this out in his motion for reconsideration, nothing changed.

Plaintiff was not in fact diagnosed with PTSD until 4 months AFTER suit had been filed. He filed the action (witness the shotgun complaint) on the mere suspicion that he might have PTSD due to the fact his mother had threatened to kill him: "shoot you between the eyes."

In section 5 of the opinion (App. Infra 17a), C.O.A.G takes Plaintiff's deposition statements concerning there being no legal standing to sue for Intentional Infliction of Emotional Distress on a Breech of Contract claim out of context.

In section 6 of the opinion (App. Infra 18a), C.O.A.G denies Defendants' motion for sanctions for frivolous appeal. Defendants had also filed a motion to dismiss which was of course denied.

Ironically, Defendants' threats, delivered only one month prior to the initiation of the litigation, to shoot Plaintiff "between the eyes" (Intentional Infliction of

Emotional Distress? Assault?) fell right off the table at C.O.A.G. This error, clearly listed as such in the briefs, was never taken up in the opinion. It was brought up again on motion for reconsideration but nothing changed.

As an aside, defendants' counsel have made much light of Plaintiff trying to collect $5,000,000 in damages at the age of 49 for abuse he received at the ages of 5 and 12. Defendants' counsel have not however had Plaintiff's life. Plaintiff could not upon entering psychological counseling even recall a time when he had not had the symptoms of PTSD. The Symptoms of PTSD were his life. He thought everyone had the same burdens, lived the same way. He had no memory of any other type of experience to compare it to. His PTSD is Complex PTSD of a type normally had only by long term prisoners of war. He is still totally disabled.

And, even as I write these words in the third person, a child out there somewhere in Georgia, somewhere on this tobacco road, was knocked to the ground. Might never get up again. What about them? This case was not only about me. What about them? Not everybody has money. But shouldn't those who do, have to fear the law? Does anyone remember Caldwell's portrait of Pearl? I do. I've lived that way.

***

Regarding the final aspect of this case and Defendants being awarded $9,040.42 in attorney's fees and costs, OCGA 9-15-14 under which such award was made:

Title 9, Chapter 15, Section 14 (9-15-14)

(a) In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party

against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position. Attorney's fees and expenses so awarded shall be assessed against the party asserting such claim, defense, or other position, or against that party's attorney, or against both in such manner as is just.

(b) The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under Chapter 11 of this title, the "Georgia Civil Practice Act." As used in this Code section, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

(c) No attorney or party shall be assessed attorney's fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Georgia if such new theory of law is based on some recognized precedential or persuasive authority.

(d) Attorney's fees and expenses of litigation awarded under this Code section shall not exceed amounts

which are reasonable and necessary for defending or asserting the rights of a party. Attorney's fees and expenses of litigation incurred in obtaining an order of court pursuant to this Code section may also be assessed by the court and included in its order.

(e) Attorney's fees and expenses under this Code section may be requested by motion at any time during the course of the action but not later than 45 days after the final disposition of the action.

(f) An award of reasonable and necessary attorney's fees or expenses of litigation under this Code section shall be determined by the court without a jury and shall be made by an order of court which shall constitute and be enforceable as a money judgment.

(g) Attorney's fees and expenses of litigation awarded under this Code section in a prior action between the same parties shall be treated as court costs with regard to the filing of any subsequent action.

(h) This Code section shall not apply to proceedings in magistrate courts. However, when a case is appealed from the magistrate court, the appellee may seek litigation expenses incurred below if the appeal lacks substantial justification.

So far, so good. OCGA 9-15-14 as passed by the Georgia General Assembly is a sanction and is apparently no different than Fed.R.Civ.P. 11. It is my recollection that sanctions are also available under rules 26 and 37.

On closer inspection however this law would appear to have some Due Process problems. First, OCGA 9-15-14 (e) allows for a motion to be filed up to "45 days" after a

favorable, to the movant, disposition. A Notice of Appeal under Georgia law must however be filed within 30 days. It can easily be seen that the disposition of a motion under OCGA 9-15-14 will not be included in the main appeal of the case. A discretionary appeal must be taken under OCGA 5-6-35(a)(10). It can easily be seen, as happened in this case, that the application for discretionary appeal may be denied and a petition for certiorari to the Supreme Court of Georgia may be denied. The movant who has won a judgment may take his *fieri fascias* and wipe the loser, his bank accounts and assets, from the face of the planet before the loser has access to any court.

Now it could be argued that the loser can get a stay of the judgment in each court along the way. But can he? Does a court who has not taken the case by granting the discretionary appeal or the petition for certiorari even have jurisdiction to grant a stay?

How is it that a litigant's property, his money that he needs to go forward with an appeal, may be confiscated at such a time as to keep him from even mounting an appeal. A Litigant can be wiped out; even if the law is on his side; even if, according to the facts and the law, he is legally capable of winning the underlying case on appeal. In the case before This Court, Defendants had a judgment and *fieri fascias* in December 2007, 4 months before the main body of this case was even denied certiorari by this Court. Is this Due Process?

(The Federal Rules of Appellate Procedure handle this problem by extending the time to file a notice of appeal until 30 days after an order has been entered disposing of any motion for attorney's fees. The federal procedure is Due Process. The issue of attorney's fees as a sanction may be taken up in the main appeal.)

Further, OCGA 9-15-14 (g) stops a Plaintiff, who has lost an award of fees and expenses, and cannot pay them, from ever bringing another action against that defendant.

Under this scheme of law, my mother could now follow through on her threat to shoot me "between the eyes," and my estate could not bring a Wrongful Death action until such time as the original judgment owing her was paid.

Is this Due Process of Law?

(It seems to me that the remedy for Abusive Litigation is the tort of Abusive Litigation--not a scheme such as this.)

Further, according to the Supreme Court of Georgia in *BETALLIC, Inc. et. al. v. DEAVOURS et. al. 263 Ga. 796 (439 SE2d 643)*, OCGA 9-15-14 is not quite what it seems to be; it is not a clone of Fed.R.Civ.P. 11. In *BETALLIC,* The Supreme Court of Georgia held that the movant has up to 45 days after the disposition of the entire case to ask for attorney's fees on the entire case. See Justice Hunstein's dissent at page 798: "The reasonableness of this construction...."

Judge Ison also joined in the dissent.

Is this "New Law" passed from the bench by the Supreme Court of Georgia? Not only that, what originally looked like a sanction now looks like the tort of Abusive Litigation. See *YOST v. TOROK et al., 42789 (256 Ga. 92) (344 SE2d 414) (1986)* at page 95: "To define anew -- into a single cause of action..." wherein The Supreme Court of Georgia quotes the language of OCGA 9-15-14 in describing the tort of Abusive Litigation.

How can a judge now find facts on what is essentially the tort of Abusive Litigation when the Georgia constitution, Article I, Section I, Paragraph XI, requires a jury trial on every case unless the litigant waives such jury trial in writing, or on record in a hearing. See HOWARD *v. BANK SOUTH, 209 Ga.App. 407 (433 SE2d 625) (1993)* at page 410: "'The Constitution of Georgia as well as the Civil Practice Act....'" Affirmed by the Georgia Supreme Court as *BANK SOUTH, N.A. v. HOWARD, 264 Ga. 339 (444 SE2d 799).*

As an aside, attorneys fees and costs on a given case can run into hundreds of thousands, even millions of dollars. Did the Founding Fathers mean for a single individual, a judge, to have the power to bankrupt another individual? Does absolute power not have a corrupting influence? Does anyone recall the utterances of Lord Acton? Is this absolute power to destroy not meant to be tempered by the 7th Amendment and the learned words "where the value in controversy shall exceed twenty dollars?"

I may be the nuttiest nut that fell off the tree but I think so.

It is for this reason, in the hearing of November 17th, 2007, that I moved the trial court for a jury trial on these issues. I believe that a jury is the only entity that can constitutionally deliver a verdict on damages pursuant to OCGA 9-15-14--as The Supreme Court of Georgia has held it to be in *BETALLIC* supra. Under the holding in *BETALLIC,* OCGA 9-15-14 is not a sanction; it is a tort, the tort of Abusive Litigation. Under both the 7th Amendment and Article I, Section I, Paragraph XI of the Georgia constitution, only a jury may award damages on a tort.

Also, for those not in the know, let me explain to you why defendant-type lawyers don't use the tort of Abusive Litigation versus OCGA 9-15-14. If a counterclaim is in fact filed, the plaintiff may indeed pull out of the case. This leaves defendant lawyers with no case to litigate, so they had rather string the unwary plaintiff along, making all the money they can in the process, then trap him in the end with OCGA 9-15-14. The Supreme Court of Georgia is very much aware of this, thus the holding in *BETALLIC* supra.

Further, OCGA 9-15-14, that began as a sanction, now looks curiously like the "loser pays" England Rule (the litigant can ask the judge for fees and costs for the entire case, as was done in this case). Why has the England Rule never been initiated in the federal courts of the United

States? Attorney's fees have never been awarded against the loser for an entire case in the federal court system, except as a punitive damage paid by defendants in civil rights and certain other cases. See *HALL v. COLE, 412 U.S. 1*, at page 5 citing *NEWMAN, VAUGHAN, BELL* and *ROLAX. HALL* itself is a labor rights case. *NEWMAN* is a civil rights case and *VAUGHAN* is a seaman's worker's compensation-type case. All are where Plaintiff's were awarded fees for a "punitive" damage as stated in *HALL.* Further, see *F.D. RICH CO. v. INDUSTRIAL LUMBER CO., 417 U.S. 116,* at page 129: "We have observed that 'one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate rights if the penalty for losing included the fees of their opponents' counsel.' Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967)."

Did my "penalty" for losing the case now before this Court (for reasons that seemed to have nothing to with the facts and the law) include "the fees of their opponents' counsel?" Is it this possibility of losing when one has not truly lost, when one has had a valid case and a valid cause, that makes an award of attorney's fees and cost, as it is done in Georgia, repugnant to due process as guaranteed by the 14th Amendment? Has the England Rule never been instituted in the federal court system because it is repugnant to due process of law for the reasons I have just stated, for the reasons stated in Fleishmann supra?

There are many reasons a litigant may lose his case: incompetent counsel, incompetent judge, incompetent appellate courts, corrupt judges, corrupt appellate courts, incompetent juries, biased, prejudiced, bigoted judges and/or juries; the list goes on.... Do all these possibilities for losing a case not make the England Rule repugnant to Due Process of Law? I am a mental incompetent, but I am no fool; I think so.

I think the England Rule is repugnant to Due Process; and I think OCGA 9-15-14, as it has been laid out by The Supreme Court of Georgia in *BETALLIC* supra (an award of fees for the entire case, by a judge, within 45 days of its disposition) is also repugnant to Due Process and Trial by Jury--that is, if it is not simply repugnant to the U.S. constitution because it is not the law of the state of Georgia as passed by its General Assembly, because it is a "new law" passed from the bench of Georgia's state supreme court.

It is to the above that I objected in the November 19th 2007 hearing (pages 9 to 13) on attorney's fees and costs:

> THE COURT: Mr. Kirkland.
> MR. KIRKLAND: Your Honor, could I sit here while I argue? I have some physical problems. I might not be able to make it all the way through this if I have to stand.
> MR. HOLLINGSWORTH: I don't have any objection, Your Honor.
> THE COURT: All right. That's fine.
> MR. HOLLINGSWORTH: As long as the court reporter can hear him.
> THE COURT: I think he speaks plenty clearly.
> MR. KIRKLAND: First of all, I'd like to move for a continuance until the case has been decided by the U.S. Supreme Court. I have until December 9th to file a petition for certiorari. I had ninety days from the date that it was denied by the State Supreme Court. For me to spend my money, time and effort to defend against a motion for attorney's fees and costs before all appeals are exhausted and the case is *res judicata*, violates the due process of the Fourteenth amendment of the U.S. Constitution. I'm actually having money taken from my pocket to defend something before it

has been decided. It's like suing someone before they've actually damaged you is what it amounts to. There has been no *res judicata* in this case. Once the U.S. Supreme Court denies
(Page 9)
Cert., grants Cert., decides it, then it will be *res judicata* and they can go ahead and it won't be a due process violation. It also violates the equal protection clause of the Fourteenth Amendment because I believe it is contrary to the Georgia State law. Would you like to rule on the continuance, Your Honor?
THE COURT: I will listen to whatever you have to say, Mr. Kirkland
MR. KIRKLAND: So I take it that that's a no?
THE COURT: No. Since you're acting as your own counsel, you will have to make the decision about what you argue and what you present to the Court.
MR. KIRKLAND: Well, Your Honor, that was my argument. Are you willing to grant the continuance until it's actually tried by the U.S. Supreme Court?
THE COURT: No sir. Denied.
MR. HOLLINGSWORTH: Thank you, Judge.
MR. KIRKLAND: In the Court of Appeals Defendants filed a motion for sanctions and to dismiss under Rules 15 (b) and 41. Of course, 15 (b) is for frivolous appeal. They are allowed to go item by item in any of the errors or any of the issues presented in court and sanction for that amount. They're also allowed to dismiss the case on sanctions under Rule 41 because it's frivolous. They did neither. They denied that motion. That Court decided
(Page 10)
the issues against them and the issues of Rule 15(b) and 41 are exactly the same issues as OCGA 9-15-14(a) and (b). In order for anything that I argue to fall under 9-15-14(a) and (b), it has to fall under 15(b). So

the questions of law and fact covered under 9-15-14(a) and (b) have already been decided against the Defendants by the Court of Appeals. They denied the motion. Do you have a question there, Your Honor?
THE COURT: No sir.
MR. KIRKLAND: They now ask this Court to redecide the issue, a second decision on the same issues violates the doctrine of *res judicata*. To violate the doctrine of *res judicata* is also a violation of due process under the Fourteenth Amendment, the due process clause of one time through on any single legal issue, not twice. It also violates the equal protection clause and I believe that is contrary to State law as well to decide an issue twice. What is the Court's ruling on that, Your Honor?
THE COURT: Denied because they are not seeking any fees or expenses for appellate work. They're only seeking fees and expenses for the defense of the lawsuit in this court.
MR. KIRKLAND: What I was saying, Your Honor, I'm aware of that, but all the issues that were argued in this court were also, since they were ruled against -- in
(Page 11)
other words, this Court ruled against the Plaintiff they were brought up in the errors, so anyone of those issues --
THE COURT: No sir. Those are two separate issues. Fees and expenses for appeal is different from fees and expenses for the trial court. I can't award fees and expenses for appeal and they can't award fees and expenses for work before the trial court. Those are two different issues; therefore, it's not *res judicata*. It doesn't settle anything.
MR. KIRKLAND: I'd also like to demand a jury trial on the issues. In Gideon v. Wainwright, 372 U.S. 335,

Gideon argued the Sixth Amendment requiring representation by counsel in a criminal proceeding applied to the State via the due process clause of the Fourteenth Amendment. It goes without saying that if Gideon's argument was found to be true by the U.S. Supreme Court, the Seventh Amendment requiring a trial by jury also applies to the State via the due process clause of the Fourteenth Amendment. A trial by jury was demanded at the outset of this case so for the trial court to now decide issues of fact regarding 9-14-15(a) and (b) is a violation of the U.S. Constitution. The issues of fact are as follows on OCGA 9-15-14(a), complete absence in facts. At some point along the way, the facts were

(Page 12)

reached of such a substantial place, they become a complete absence. It's definitely a jury issue. It's a graded approach to that. Also, what can be reasonably believed that a court would accept as asking what is reasonable. That's a fact as well. That's something that a jury would normally answer, what is reasonable. When you go to 9-15-14(b), substantial justification, the word substantial is definitely a jury issue. What constitutes substantial? There's a little bit more just like a complete absence and then at some point reads as substantial; so it is a fact. Improper conduct, that's also a fact. Substantially frivolous, there we go with substantially again. What constitutes substantially is an issue of fact. Basically, I would like a jury trial.

THE COURT: Motion for a jury trial is denied. The statute is very clear that this is an issue for the Court to determine.

MR. KIRKLAND: Your Honor, I'd like to swear in Mr. Hollingsworth.

MR. HOLLINGSWORTH: Would you like for me to

take the stand, Mr. Kirkland?
MR. KIRKLAND: Well, it doesn't matter whichever he'd like.
MR. HOLLINGSWORTH: I'll be happy to.
(Page 13)(Note: this transcript of proceedings is verbatim to the transcript of proceedings for Kirkland v. Tamplin also before this court on a petition for certiorari. For "purposes of judicial economy," the judge allowed Plaintiff to object once and then stipulated that the objection would become part of the record for both cases and was recorded as such by the court reporter.)

Plaintiff then attempted to examine Mr. Thomas F. Hollingsworth, III, counsel for the defendants, on the facts of the case as outlined in the Findings of Fact which he himself (the judge didn't prepare it) prepared. Judge Hodges however leaned over to the witness chair, very promptly at the outset of the examination, and suggested to Mr. Hollingsworth, III that he might want to object to any examination on the facts, the ones he had alleged in order to extract that certain sum of cash in fees and costs from the Plaintiff. Mr. Hollingsworth, III did in fact object. Judge Hodges promptly thereafter sustained his (to clarify, Mr. Hollingsworth, III's) objection.

How could Judge Hodges have anticipated such a thing?

Could it be that Judge Tice, another judge in The Northern Judicial Circuit, had told Judge Hodges of a quite harrowing experience in his own courtroom on another case wherein Plaintiff's pocket had been similarly picked for nigh onto $5000, wherein Plaintiff had eaten Mr. Hollingsworth, III alive, then flossed his teeth, while two other lawyers muttered under their breath in an attempt to distract Plaintiff, and a popinjay in the gallery whistled him on?

Apparently it's bad relations for the Georgia public to witness an Alabama clodhopper outlawyer a Georgia lawyer with a "III" after his name.

Unfortunately however I made insufficient constitutional objections prior to dining at Mr. Hollingsworth, III's table, and that case is not before this court.

As an aside, the above may seem somewhat comical, as I have written it; it was not comical at all to experience.

The Plaintiff maintained the objections he had raised in the trial court in the following errors in his application for discretionary appeal to The Court of Appeals of Georgia:

1. The trial court's hearing of Defendants' motion for attorney's fees and costs before the case was res judicata [a thing decided] by the Supreme Court of The United States was erroneous.
2. The trial court's redeciding of the issue of whether any part of Plaintiff/Applicant's legal positions in the instant case constituted "a complete absence of any justiciable issue of law or fact," were "frivolous," or lacked "substantial justification"--issues already decided by The Court of Appeals in hearing Defendants' Rule 41 (c) Motion to Dismiss and Rule 15(b) motion for sanctions for frivolous appeal--violated the doctrine of res judicata and was erroneous.
3. The trial court's sitting as trier on fact on the consequential damages flowing from the tort of Abusive Litigation when the Plaintiff/Applicant had requested a jury trial was error.
4. The trial court's grant of attorney's fees and costs on the issue of the "Motion for Relief" was erroneous.
5. The trial court's grant of attorney's fees and costs on the issue of the re-cusals of the two judges was

erroneous.

6. The trial court's grant of attorney's fees and costs on the issues of the discovery rule, Plaintiff's alleged recanting of the monetary damages, Defendant's threats to murder and Plaintiff's alleged recanting of the Breech of Contract damages was error.

Plaintiff timely served Georgia's Attorney General with a copy of the filing in The Court of Appeals of Georgia.

Plaintiff maintained his objections in the same six errors in his petition for certiorari to The Supreme Court of Georgia. Again, Georgia's Attorney General was timely served with a copy of the filing in The Supreme Court of Georgia.

Now, maybe the Plaintiff, being a mental incompetent and a totally untrained (formally) advocate of the law, and having an 11th grade education (the crucible of Geometry ruining any aspirations he had to higher learning), did not always raise his objections to the proceedings in the courts below in a completely clean and totally pristine manner. But he did object at all times to the outcome. And possibly such objections as he did make will be found to be sufficiently collateral to the actual issues to be considered as a part of the whole. In that vein, he asks that the Court grant him as much sidewise slip, leniency, as possible in these and all previous of his pleadings. See HAINES v. KERNER, 404 U. S. 519 (92 SC 594, 30 LE2d 652) (1972), wherein a party *pro se* is not required to plead all aspects of his case with laser-like, surgical precision.

E. OTHER RELIEF

Plaintiff/Petitioner also prays for such other and further relief as may be due and granted under the rules of this

court and the laws of the United States.

REASONS FOR GRANTING THE PETITION

Justice.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Good day, and as always,
Respectfully submitted,

Dwain Lee Kirkland
Pro se
P.O.B. 773
Hull, GA. 30646
706.788.3158

August 2008

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

Date: May 19, 2008

Dwain Lee Kirkland
P.O. Box 773
Hull, GA 30646

Case No. S08C0966

DWAIN LEE KIRKLAND v. RUBY KIRKLAND, EXECUTOR et al.

COURT OF APPEALS CASE NO. A08D0184 S08C0648 S08C0965

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Therese S. Barnes, Clerk

Supreme Court of the United States
Office of the Clerk
Washington, DC 20548-0001

William K. Suter
Clerk of the Court
(202) 479-3011

April 14, 2008

Mr. Dwain Lee Kirkland
P.O. Box 773
Hull, GA 30646

Re: Dwain L. Kirkland
v. Ruby Kirkland, et al.
No. 07-1115

Dear Mr. Kirkland:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,
s/William K. Suter
William K. Suter, Clerk

Court of Appeals
of the State of Georgia

ATLANTA, JANUARY 31, 2008

The Court of Appeals hereby passes the following order:

APPLICATION NO. A08D0184

DWAIN LEE KIRKLAND V. RUBY KIRKLAND, EXECUTOR ET AL

Upon consideration of the Application for Discretionary Appeal, it is ordered that it be hereby DENIED.

98016

04MV584

circular stamp: "Court of Appeals of the State of Georgia 1906")

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta JAN 3 1 2008 (stamped)

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk,

s/William L. Martin, III

IN THE SUPERIOR COURT OF MADISON COUNTY
STATE OF GEORGIA

DWAIN LEE KIRKLAND, Plaintiff,	)
vs.	)
	) CIVIL ACTION FILE
	) NO. 04-MV-584-H
RUBY KIRKLAND, EXECUTOR OF THE ESTATE OF A. LEON KIRKLAND, and RUBY KIRKLAND, Defendants.	)

Filed in Office
2007 Dec 10 11:00 AM
Michelle H. Strickland
Clerk of Court
Madison, Georgia
2007-11454
(stamp)

ORDER

The Defendants' Motion for Attorney's Fees and Expenses of Litigation having come before this Court for hearing, and this Court having considered the filings of Plaintiff and Defendants and argument of the Plaintiff, as well as the argument of counsel for the Defendants, and having reviewed the entire record in this case, the Court hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Plaintiff commenced the above styled action on July 9, 2004.

2. Plaintiff's Complaint alleges that the Plaintiff was entitled to a recovery based on (1) various allegations of abuse received as a child, (2) alleged threats made by Defendant Ruby Kirkland against Plaintiff and (3) an alleged breach of contract.

3. The Plaintiff was born in 1955, reached the age of 18 in 1973 and filed this action in 2004.

4. Plaintiff s allegations of abuse received as a child occurred before 1973.

5. Plaintiff stated during the conduct of this action, by sworn affidavit, that he seeks a recovery only for four specific incidents (1) an incident in which he alleges he was beaten at age five, (2) an allegation of being slapped at the age of five, (3) alleged abuse at the age of twelve involving being locked out of the house, and (4) alleged abuse at the age of twelve in an incident involving babysitting.

6. Plaintiff further states, by sworn affidavit, that none of the following causes mentioned in the Complaint caused any damage calculated in the original Complaint as amended: "emotional neglect, negligence of medical care, negligence of custodial care, negligence of physical defense, emotional violence, th eats to strike with a hand, threats to strike with an object, verbal abuse, profane verbal abuse and others of enumerated paragraph I; breeches [sic] of contract and others of enumerated

paragraph 2; threats amounting to immobilization, threats to murder, breeches [sic] of contract and others of enumerated paragraph 3."

7. Plaintiff has testified in his deposition that he pursues no claim for breach of contract.

8. Plaintiff moved to recuse the Honorable Thomas L. Hodges, on or about October 4, 2005.

9. The only allegation made in support of the motion to recuse Judge Hodges was that in a previous hearing in another case, Judge Hodges stated "Mr. Dwain Kirkland has filed a caveat which I assume was decided against him in the probate court and he has now filed an appeal to this court."

10. Plaintiff moved to recuse the Honorable John H. Bailey, Jr., on or about September 18, 2006.

11. Plaintiff offered no evidence to support recusal of Judge Bailey.

12. Plaintiff filed a motion entitled "Motion for Relief" on or about May 5, 2006, in which Plaintiff, appearing pro se, sought the right to retain counsel while continuing to represent himself.

13. Defendants were forced to respond to Plaintiff's Complaint, to respond to Plaintiff's Motion to Recuse Judge Hodges, to respond to Plaintiff's Motion to Recuse Judge Bailey and to respond to Plaintiff's Motion for Relief

14. Defendants incurred $8,695.00 in attorney's fees and

$345.42 in expenses for a total of $9,040.42 in defense of the above styled action in the Superior Court of Madison County.

Conclusions of Law

1. Plaintiff's Complaint presented no justiciable issue of law or fact in this case.

2. Plaintiff's allegation that he suffered abuse by Defendants as a child was clearly barred by the statute of limitations as stated in O.C.G.A. § 9-3-33, thereby presenting no justiciable issue of law or fact.

3. Plaintiff's allegations of childhood abuse against Defendants were explicitly recanted by Plaintiff's own sworn affidavit thereby presenting no justiciable issue of law or fact.

4. Plaintiff's allegation that he was injured as a result of threats made by Defendant Ruby Kirkland is explicitly contradicted by Plaintiff's own sworn affidavit which states that he suffered no damage as a result of the alleged threats thereby presenting no justiciable issue of law or fact.

5. Plaintiff's allegation that he was injured as a result of the breach of a contract by Defendants is explicitly contradicted by Plaintiff's own sworn affidavit and deposition testimony which state that he suffered no damage for the alleged breaches of contract thereby presenting no justiciable issue of law or fact.

6. Alternatively, Plaintiff's commencement of this action and the causes of action alleged therein lacked substantial justification and was substantially frivolous.

7. Plaintiff's prosecution of this action against the Defendants for the causes of action alleged were interposed for harassment of Defendants who are Plaintiff's mother individually and in her capacity as the personal representative of the estate of the late Armon Leon Kirkland, the Plaintiff's father.

8. Plaintiff's motions to recuse the Honorable Thomas L. Hodges, and John H. Bailey, Jr., lacked substantial justification as they failed to satisfy the requirements of Uniform Superior Court Rule 25 and Georgia law. Plaintiff failed to present any valid basis for recusal and such motions were substantially frivolous.

9. Plaintiff's motions to recuse the Honorable Thomas L. Hodges, and John H. Bailey, Jr., were filed as a means of prolonging the litigation of this action, were filed by Plaintiff with the purpose of delay and harassment and unnecessarily expended this proceeding.

10. Plaintiff's "Motion for Relief" lacked substantial justification as Ga. Const. Art. 1, § 1, paragraph 12, does not permit a party to retain counsel and continue to proceed pro se.

11. Plaintiff's "Motion for Relief" was filed as a means of prolonging the litigation of this action, was filed by Plaintiff with the purpose of delay and harassment and unnecessarily expanded this proceeding.

12. Defendants have presented sufficient evidence to prove the actual attorney's fees and expenses of litigation rendered in this action and the reasonableness thereof.

13. Plaintiff offered no evidence contradicting the actual attorney's fees and expenses of litigation rendered in this action and offered no evidence contradicting the reasonableness thereof.

14. The attorney's fees and expenses of litigation rendered by Defendants were necessary in the defense of this action, and were necessary to respond to Plaintiff's Complaint, respond to Plaintiff's Motion to Recuse Judge Hodges, to respond to Plaintiff's Motion to Recuse Judge Bailey and to respond to Plaintiff's Motion for Relief.

Based on the above Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED AND ADJUDGED that Defendants are entitled to an award of their reasonable attorney's fees and expenses of litigation pursuant to O.C.G.A. § 9-15-14(a) or, in the alternative, O.C.G.A. § 9-15-14(b) in the amount of $8,695.00 in attorney's fees and $345.42 in expenses for a total of $9,040.42. Any Finding of Fact which could be considered a Conclusion of Law, and any Conclusion of Law which could be considered a Finding of Fact, is hereby deemed to be such.

SO ORDERED this 4th day of December 2007.

s/Thomas L. Hodges, III

_____

Honorable Thomas L. Hodges
Judge
Superior Court of Madison County, Georgia

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

Date: September 10, 2007

Dwain Lee Kirkland
P.O. Box 773
Hull, GA 30646

Case No. S07C1385

DWAIN LEE KIRKLAND v. RUBY KIRKLAND et al.

COURT OF APPEALS CASE NO. A07A0863 S07C1399 S07C1519

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Therese S. Barnes, Clerk

THIRD DIVISION
BLACKBURN, P. J.,
RUFFIN and BERNES, JJ.

NOTICE: Motions for reconsideration must be physically received in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, September 5,2002)
http://www.gaappeals.us/rules/

April 17, 2007

In the Court of Appeals of Georgia

A07A0863. KIRKLAND v. KIRKLAND et al. BL-043

BLACKBURN, Presiding Judge.

Dwain Lee Kirkland, pro se, appeals the denial of his motion for summary judgment and the grant of summary judgment to his mother, Ruby Kirkland, whom Dwain sued individually and in her capacity as executor of his father's estate, alleging various tortious conduct. Dwain contends that the trial court erred by (1) denying two recusal motions, (2) relying on Ruby's affidavit filed in response to Dwain's motion for summary judgment, (3) ruling that his personal injury claims were time barred, (4) ruling that his claim based on post traumatic stress disorder (PTSD) was not a continuing tort, (5) and granting summary judgment on his breach of contract claim. For the reasons that follow, we affirm.

Summary judgment is proper when there is no genuine issue of
material fact and the movant is entitled to judgment as a matter of law. OCGA § 9-11-56 (c). A de novo

> standard of review applies to an appeal from a grant of summary judgment, and we view the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant.

Matjoulis v. Integon Gen. Ins. Corp.[1]

So viewed, the record shows that in July 2004, Dwain, then a forty-nine-year-old, filed a complaint against his mother and his deceased father's estate, alleging various tortious acts committed during his childhood which amounted to intentional and negligent infliction of emotional distress, assault, battery, and breach of contract. Dwain also alleged that he now suffers from PTSD due to the physical and verbal abuse he received as a child, and that Ruby threatened to kill him in 2004, just prior to his filing of the lawsuit. After deposing Dwain, Ruby moved for summary judgment, arguing that Dwain's claims were time-barred by the two-year statute of limitations in OCGA § 9-3-33. Dwain then moved for summary judgment, and Ruby responded with an affidavit denying Dwain' s factual allegations. After a hearing, the

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[1] *Matjoulis v. Integon Gen. Ins. Corp.*, 226 Ga. App. 459 (1) (486 SE2d 684) (1997).

trial court granted Ruby's motion and denied Dwain's motion, giving rise to this appeal.

1. During the discovery process, Dwain moved to recuse Judge Hodges, who was assigned this case and who had apparently earlier heard a separate case in which Dwain appealed a probate court ruling on Dwain's caveat

to his father's will. Judge Bailey held a hearing on Dwain's motion and subsequently denied Dwain's motion to recuse Judge Hodges. Dwain then filed a motion to recuse Judge Bailey, who denied that motion as untimely. Dwain now appeals the denial of both motions to recuse.

(a) *Recusal of Judge Hodges.*

> This Court employs an abuse of discretion standard in reviewing rulings made upon motions to recuse. In order to disqualify a judge, the alleged bias must stem from an extra-judicial source and result in an opinion based on something other than what the judge learned from participating in the case. The trial judge has the duty to determine whether, assuming the truth of the facts alleged, a reasonable person might conclude that the judge harbors bias, stemming from an extrajudicial source, which is of a nature and intensity as would interfere with the exercise of impartial judgment.
>
> (3)

(Citation and punctuation omitted.) *Kirkland v. Tamplin.*[2]

Here, Dwain based his motion to recuse on an affidavit alleging that Judge Hodges (1) displayed a "tone of voice and facial expression" showing animosity, and (2) that Judge Hodges said, "Mr. Kirkland has filed a caveat which I assume was decided against him in the probate court and he has now filed an appeal to this court." With respect to Judge Hodges's "tone and demeanor," Dwain's conclusory characterization does not demonstrate an extra-judicial bias of a nature and intensity that would interfere with an impartial exercise of judgment. See *Kirkland v. Tamplin,* supra, _ Ga. App. _, slip op. at 11-12 (3) (a). With respect to Judge Hodges's statement, which was accurate

and respectfully worded, we discern no evidence of bias. Accordingly, this enumeration is without merit.

(b) *Recusal of Judge Bailey.* Following Judge Bailey's ruling on the motion to recuse Judge Hodges, Dwain moved to recuse Judge Bailey, citing the fact that Judge Bailey had in a prior unrelated hearing appeared "friendly" and in the recusal hearing Judge Bailey appeared "flat" and did not ask any questions. Dwain also alleged that Judge Bailey off the record chatted briefly with opposing counsel in a friendly

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[2] *Kirkland v. Tamplin,*_ Ga. App. _, slip op. at 9-10 (3) (A07A0663; decided February 1, 2007).

manner without chatting with Dwain. These assertions are identical to arguments we found meritless in an earlier appeal brought by Dwain in a similar case. See *Kirkland v. Tamplin,* supra, _ Ga. App. _, slip op. at 13 (3) (b). We therefore discern no error here.

2. Dwain contends that an affidavit Ruby filed in response to Dwain's motion for summary judgment was untimely. We disagree.

OCGA § 9-11-56 (c) provides that a party adverse to a motion for summary judgment may serve an opposing affidavit "prior to the day of hearing." Here, the trial court sent both parties a rule nisi notice one month before the hearing, which was held on October 18,2006. On October 17,2006, Ruby filed an affidavit disputing the facts alleged by Dwain, and served the affidavit by U.S. mail the same day, i.e. one day prior to the hearing. As service by mail is complete upon mailing, OCGA § 9-11-5 (b), the affidavit was not untimely. See *Martin v. Newman,*[3] *Owen*

v. M & M Metro Supply, Inc.[4] ("service is perfected where there is proof of service in one of the ways

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[3] Martin v. Newman, 162 Ga. App. 725, 726 (2) (293 SE2d 18) (1982).

[4] Owen v. M & M Metro Supply, Inc., 198 Ga. App. 420, 421 (1) (401 SE2d 612) (1991).

specified in the statute, even though the adverse party may not have in fact received actual notice").

3. Dwain contends that the trial court erred in ruling that his claims were barred by the statute of limitations. We disagree.

As demonstrated by Dwain' s complaint, deposition, and subsequent affidavits, Dwain alleges that Ruby and his father committed various personal injuries to Dwain when Dwain was a child, and he now seeks damages for those abuses.[5] Ruby moved for summary judgment on the ground that Dwain' s claims were time barred by OCGA § 9-3-33, which provides that "(a)ctions for injuries to the person shall be brought
within two years after the right of action accrues." As the alleged abuses were themselves wrongful, Dwain' s right of action accrued at the time of the abuse, which Dwain's deposition shows ended at the latest, by the time he moved out of state in 1977, when Dwain was 22. See *Risner v. R. L. Daniell & Assoc. P. C.*[6] Hence, the trial court did not err in granting summary judgment to Ruby.

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[5] Dwain's complaint contains many wide-ranging and

vague allegations. However, in an affidavit filed July 10,2006, he concedes that many of the alleged wrongful acts did not cause monetary damages.

[6] *Risner v. R. L. Daniell & Assoc. P.C.,* 231 Ga. App. 750, 752 (500 SE2d 634) (1998).

(6)

4. Dwain also contends that the trial court erred in refusing to apply the theory of continuing tort to his allegation of PTSD. We disagree.

Dwain alleges that due to physical and mental abuse he received as a child, he now suffers from PTSD as an adult. In response to Ruby's statute of limitations defense, Dwain alleges that he did not discover his disorder until 2004, the year he filed this suit. However, "[t]he fact that appellant may not have recognized, or discovered, the full impact of the alleged harm until [2004] does not obviate the fact that [his] exposure to the tortious acts producing the injur[ies]," ceased more than two years before he filed his complaint.[7] *Hickey v. Askren.* [8] See *Bitterman v. Emory University* [9] (plaintiff s "injury was occasioned by violent external means and the statute of limitation began to run on the day his injury was actually sustained") (punctuation omitted). Therefore, this enumeration is without merit.

5. Dwain also contends that the trial court erred in granting summary judgment to Ruby on a breach of contract claim. However, in his deposition and a subsequent

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[7] Because Dwain was no longer a minor as of 1973, this outcome is not affected by OCGA § 9-3-90, which tolls

the statute of limitations during which time a person is a minor.

[8] *Hickey v. Askren,* 198 Ga. App. 718, 720 (2) (403 SE2d 225) (1991).

[9] *Bitterman v. Emory University,* 175 Ga. App. 348 (1) (333 SE2d 378) (1985).

affidavit, Dwain conceded, in his own words, that (1) "there is no real legal aspect to" his breach of contract claim, (2) "there is no claim there," and (3) that he did not find that claim to "have caused the monetary damages" alleged in the complaint. In Dwain's brief, he asserts that he was remembering the claim incorrectly during his deposition, and that he supplemented his deposition with an affidavit. However, that
affidavit alleged that his father had an extramarital affair and contains nothing relating to a breach of contract. Accordingly, we discern no error.

6. We exercise our discretion to deny defendants' motion for sanctions. Dwain's remain enumerations are moot.

Judgment affirmed. Ruffin and Bernes, JJ., concur.

IN THE SUPERIOR COURT OF MADISON COUNTY
STATE OF GEORGIA

FILED IN OFFICE
2006 Oct 23 02:07 PM
MICHELE H. STRICKLAND
CLERK OF COURT
MADISON, GEORGIA
2006-8515
(stamped)

DWAIN LEE KIRKLAND)
Plaintiff,

v.) CIVIL ACTION FILE
NO.04-MV-584-H

RUBY KIRKLAND, EXECUTOR OF
THE ESTATE OF A. LEON
KIRKLAND, and RUBY KIRKLAND,

Defendants.)

ORDER

The Plaintiff's Motion for Summary Judgment and the Defendants' Motion for Summary Judgment having come before this Court, and the Court having reviewed the parties' briefs and all admissible matters of record in this action, and having heard oral argument from counsel for Defendants and from Plaintiff, pro se;

This Court finds that there exists no genuine issue as to any material fact in this case, and

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment is denied;

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment is granted.

SO ORDERED this 23rd day of October, 2006.

(signed)

The Honorable Thomas L. Hodges
Judge, Superior Court
Madison County, Georgia